



City of San Diego
Development Services
1222 First Ave., MS-302
San Diego, CA 92101

Development Permit/ Environmental Determination Appeal Application

FORM
DS-3031

November 2017

In order to assure your appeal application is successfully accepted and processed, you must read and understand [Information Bulletin 505](#), "Development Permits/Environmental Determination Appeal Procedure."

1. Type of Appeal: ☐ Appeal of the Project
☒ Appeal of the Environmental Determination

2. Appellant: Please check one ☐ Applicant ☐ Officially recognized Planning Committee ☒ "Interested Person"
(Per M.C. Sec. 113.0103)

Jennifer J. Hasso

Name: Jennifer J. Hasso c/o Rodric M. Wright, Attorney at Law E-mail: jhasso@gmail.com; thewrightlaw@icloud.com

Address: 2765 Second Avenue City: San Diego State: CA Zip Code: 92103 Telephone: 619-232-2765

3. Project Name:

Olive St. Park and Acquisition No. 625365

4. Project Information

Permit/Environmental Determination & Permit/Document No.: Olive St. Park and Acquisition/No. 625365 Date of Decision/Determination: April 13, 2020 City Project Manager: Gretchen Eichar/ Karen Bucey/

Decision(Describe the permit/approval decision):

The City determined that a new development of a large Memorial Park in a residential Banker's Hill neighborhood, on and around biologically & environmentally sensitive, significant Maple Canyon land, is categorically exempt from CEQA per Sections 15303 & 15332. The city reached these conclusions without conducting proper environmental testing, review or studies as required by law. The claimed exemptions do not apply to the project and, alternatively, an exception to the exemption applies, as this project will have a significant adverse effect that can not be mitigated the environment, sensitive land, the neighborhood, historical resources, and property & pose unreasonable risks on health and safety.

5. Ground for Appeal(Please check all that apply):

- ☒ Factual Error ☒ New Information
☒ Conflict with other matters ☒ City-wide Significance (Process Four decisions only)
☒ Findings Not Supported

Description of Grounds for Appeal (Please relate your description to the allowable reasons for appeal as more fully described in [Chapter 11, Article 2, Division 5 of the San Diego Municipal Code](#). Attach additional sheets if necessary.)

See Attachment A and Associated Exhibits

6. Appellant's Signature: I certify under penalty of perjury that the foregoing, including all names and addresses, is true and correct.

Signature:

Date: April 27, 2020

Note: Faxed appeals are not accepted.

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8 **APPEAL TO ENVIRONMENTAL DETERMINATION**

9 **WBS NO. S-10051.02.06**

10 **Attachment A**

11 Appellant, Jennifer J. Hasso ("Appellant"), who qualifies as "interested persons" in
12 accordance with SDMC Section 113.0103, hereby respectfully submits the following
13 Memorandum of Law in support of her grounds for appeal of the Environmental
14 Determination made by the City of San Diego ("City") on April 13, 2020, categorically
15 exempting project/number Olive Street Park and Acquisition/625365 ("Project Number
16 625365") from the California Environmental Quality Act (CEQA) pursuant to CEQA
17 State Guidelines, Sections 15303 (New Construction) and 15332 (In-Fill Development
18 Projects) as set forth more fully below and in the fully completed Appeal Application -
19 DS-3031 filed concurrently and incorporated herein by this reference. [Ex. 1, Notice of
20 Right to Appeal Environmental Notice (April 13, 2020).]
21

22 Appellant, Jennifer J. Hasso, respectfully appeals the following determination:
23

24 **"ENVIRONMENTAL DETERMINATION:** Categorically exempt from CEQA
25 pursuant to CEQA State Guidelines, Sections 15303 (New Construction) and 15332
26 (In-Fill Development Projects)." ("Environmental Determination")
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FACTUAL AND PROCEDURAL BACKGROUND

Project Number 625365, is a new development and complete construction of a Regional AIDS Memorial Park ("Regional Park") in a site that is under an acre (.711 of an acre) on and around Maple Canyon's biologically sensitive slopes and canyons in a primarily residential area of Banker's Hill. [Ex. 2, Report, City of San Diego to the Park and Recreation Board (June 13, 2019).] The park plan includes the construction of a massive overlook deck imposed over a small canyon area with steep slopes that is part of Maple Canyon, in which the plans call for the installation of large and significant boulders to support this massive deck, a large deck seating area, a children's playground, an adult fitness area, and an AIDS memorial wall, all designed to accommodate hundreds of people at any given time day or night. The deck and memorial wall which will contain the names of 8000 AIDS victims is to be displayed and positioned on the westerly approximate one-half of an 80-foot x 200-foot strip of land (.367 acres (16,000 sq ft.) upon Maple Canyon's open space system and its environmentally and biologically sensitive steep slopes that have continuously eroded. [Ex. 3, Olive Street Park General Development Plan; Ex. 4, Aerial Image of current Maple Canyon Deck site.]

The land on which the City proposes to construct a massive overlook deck **does not belong to the City**, but rather it belongs to Appellant (there is currently a lawsuit pending styled, "*Jennifer J. Hasso, et al. v. City of San Diego, et al.*", Case No. 19cv0368 AJB (WVG)) in which a Notice of Pendency of Action [Lis Pendens] has been recorded against APN 452-667-03 & 452-718-01 (0.367 acres - 16,000 sq ft.) the very are where this massive overlook deck is intended to be constructed.

1 The City describes the project as follows:
2

3 **“0.74-acre neighborhood park** on City of San Diego-owned open space adjacent to
4 the intersection of Olive Street and Third Avenue. The project site is surrounded by
5 healthcare, residential, office, and commercial uses. Park amenities and features
6 include an open turf area, children’s play area, adult fitness area, storm water
7 conveyance and basins, seating areas, park signage, walkways, landscaping,
8 security lighting, irrigation system, low perimeter wall, fencing and an overlook
9 deck. The project would remove non-native vegetation. A storm drain system is
10 proposed that would include connection to adjacent City of San Diego-owned storm
11 water facilities. Access to the project site would include existing sidewalks and
12 on-street parking. The Uptown Community Plan designates the site as
Population-based Park land use. The project contains Environmentally Sensitive
Lands (Steep Hillsides). It is within the San Diego International Airport Influence
Area – Review Area 2, Airport Approach Overlay Zone, Open Space (OP-1-1) Base
Zone.” [Emphasis supplied.] [Ex. 1, Notice of Right to Appeal Environmental
Notice (April 13, 2020).]

13 The City’s description of Project Number 625365 as a “neighborhood park” and/or
14 as .74 of an acre is inaccurate. The Regional Memorial Park Project is neither small nor
15 simple and is conservatively estimated to cost in excess of 3.5 million dollars. The Project
16 is designed to be an “AIDS Regional Memorial Park” per the City’s own
17 records/documents with “city-wide and regional impact” per the grant that the City
18 Council voted on as authored by Mary Carlson. The Project proposed is intended to
19 encompass .367 (16,000 sq ft.) over Olive Street and another .344 parcel (15,000 sq ft.)
20 acquired in 2010 by the City over Third Avenue. Together the total area encompasses .711
21 of an acre. This Regional Park, which the City retained landscape architects KTU&A to
22 design, pursuant to the City’s General Plan for Park Guidelines (“Guidelines”), would
23 require **“a 13 acre minimum (consistent with program and facilities on-site)”**. Per the
24 City’s Guidelines, a park which is **under 1 acre** is a **“pocket park or plaza”** and is
25 designed to **“serve the population within ¼ mile , accessible by bicycling and walking,**
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1 **no on-site parking, except for disabled access.”** [Ex. 19, Diagram of ¼ mile radius.]
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3 This Project is two blocks from Balboa Park where the AIDS Regional Memorial Park
4 was originally proposed to be constructed to accommodate the large groups of people,
5 including family members of the 8000 victims lost to this disease, so they could pay their
6 respects because of the availability of parking, ability to deal with health/safety issues,
7 minimize the impact on the community and environment, and accommodate large crowds
8 like on World AIDS Day, etc.
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10 The City's claimed impact in the Notice of Right to Appeal is also inaccurate. The
11 City does not identify that the construction of the Regional Park requires the decimation
12 of numerous native and non-native plants, complete disregard for General Plan
13 Guidelines, deviations from setback requirements, significant destruction to a 96-year old
14 designated historical landmark and resource, poses serious safety concerns for the
15 surrounding neighborhood, heightens the risk of risks of further erosion to Maple Canyon,
16 risks damaging nearby property foundations and support, increases the likelihood of
17 mudslides and water pollution, increases the risk of flooding and poses significant risk to
18 the health and safety of citizens in the community and the surrounding environment.
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22 Nor does the City identify that the park, once complete, poses significant adverse
23 impact on the community and the environment including, among other things, serious
24 health and safety concerns to local neighbors; increased significant noise and traffic in a
25 small, quite neighborhood unable to support such activity; will eliminate the ability of
26 residents to access their property due to insufficient parking; create an ongoing heightened
27 risk of mudslides and sediment loss and erosion; create an ongoing safety risk from
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1 falling trees; will damage nearby property foundations; increase flooding; subject
2 members of San Diego to pollutants from water runoff into the canyon; ongoing damage
3 to native plant life; create ongoing safety concerns and daily nuisance for nearby
4 homeowners and elderly residents of a nursing home one block south of this pocket park,
5 and schoolchildren of an adjacent preschool; and unnecessarily create a serious risk of
6 rockslides due to the use of massive boulders being placed on a steep, eroding hillside for
7 the purpose of supporting a large deck to view whatever will remain of Maple Canyon.
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9
10 Deception is defined as an act or statement which misleads, hides the truth, or
11 promotes a belief, concept, or idea that is not true. It is often done for personal gain or
12 advantage. Deception can involve dissimulation, propaganda, and sleight of hand, as well
13 as distraction, camouflage, or concealment. The question is why is the City engaged in
14 such an elaborate deceptive scheme? Why is the City insisting on constructing a Regional
15 Park on less than an acre site in a primarily residential neighborhood for which there is an
16 overwhelming opposition from the entire Banker's Hill Community Group which has
17 communicated their vehement objection in writing on multiple occasions including, on
18 Friday, September 22, 2017 to Mayor Faulconer, the Appellant who is the current owner
19 of the Emmet G. O'Neill Historic Property No. 311, located at 2765 Second Avenue, San
20 Diego, California 92103, in the Banker's Hill neighborhood of the City of San Diego (the
21 Historic Subject Property) that borders the .711 of an acre site on two sides, and the
22 LGBT community? [Ex 5, Memo Regarding Project Meeting Minutes, December 8, 2016
23 and Ex. 18, Letter dated September 22, 2017 from the Banker's Hill Community Group to
24 Mayor Faulconer with powerpoint and where the park should be located with
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1 attachments.] The answer can be found in how Project 625365 got designated as the site
2 for an AIDS Regional Memorial Park. To understand how this deceptive scheme was
3 devised, one has to understand the context.
4

5 In or about 2015, the AIDS Memorial Task Force met at the direction of Mayor
6 Kevin Faulconer, and without inviting any members of the public, began discussing the
7 conversion of Olive Street and the additional .344 of an acre acquired from Paul K.
8 Tchang, into an AIDS Memorial Park. Jen Lebron, on behalf of the Mayor's office,
9 organized these private meetings, co-chaired by Kathleen Faulconer, Mayor Faulconer's
10 wife and LGBT activist Nicole Murray Ramirez, without any members of the general
11 public. Several memos describe the secret nature of these meetings and the importance of
12 excluding the public. [Ex. 6, Jen Lebron Email Chain August 3, 2017 re AIDS Memorial
13 Task Force Update.]
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17 In 2016, the City decided to sell the Truax House, San Diego's first AIDS hospice
18 named after Dr. Brad Truax, to a private developer named Soheil Nakhshab ("Nakhshab")
19 for commercial use. The local community and the LGBT community strongly objected to
20 this transaction, but Nakhshab is connected to powerful City officials, including serves as
21 a chair on the Uptown Community Planning Group, and Nakhshab's father formerly
22 worked for the City as an engineer. At that time Councilmember, Todd Gloria, advocated
23 the sale of the Truax House to Nakhshab in a memo to Mayor Kevin Faulconer, and to
24 address the LGBT community's vehement opposition, proposed that "Olive Park" be
25 renamed Dr. Brad Truax Park and be set aside as part of the San Diego AIDS Memorial
26 called for by the General Development Plan. [Ex 7, Memorandum Dated March 25, 2016
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1 from Councilmember Todd Gloria to Mayor Kevin Faulconer.] The problem was that
2 money from the sale of the Truax House, which the City had bought with funds in a
3 Special Gas Tax Street Improvement Fund earmarked for a highway that was never built,
4 could not be directly used for an AIDS Memorial. Rather, all proceeds from the sale of
5 Truax House were required to go back to the City's gas tax fund. Mayor Faulconer, along
6 with his wife, Kathleen Faulconer, as co-chair of the AIDS Memorial Task Force with
7 LGBT activist Nicole Murray-Ramirez and Councilmember Todd Gloria, decided to find
8 a way to redirect funding from the sale of the Truax House to execute on Todd Gloria's
9 idea to use public funds for a private cause. The plan was conceived to move the funds
10 from the sale of the Truax House to the Gas Tax Street Improvement Fund and then to the
11 general fund. The funds would then be used to fund the Olive Park project, but only if it
12 was utilized as an AIDS Regional Memorial Park. In this way, the money would be
13 diverted from the City's gas tax fund into another public use fund, and indirectly to
14 support a pet cause of certain individuals, namely, an AIDS Memorial, where a private
15 cause would be funded with public funds. Further, according to Todd Gloria, this park
16 would be capable of hosting annual events like World AIDS Day. With the help of a local
17 task force that is already raising money for an AIDS memorial, we could ensure that this
18 21st century tribute to Dr. Truax and more than 7,600 San Diegans who have died of
19 AIDS will be maintained in perpetuity." [Ex. 7.] While Todd Gloria was inquiring how
20 the design could accommodate hundreds of people, the City and others were representing
21 to the public that the project would result in a neighborhood park where only 20 people
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1 would or could congregate. [Ex. 2.] The City has continued in various “reports” to
2 represent that it is not a place for “large gatherings.” Most recently in the June 13, 2019
3 Report No. 101, Herman D. Parker, director of the Parks and Recreation Department
4 stated the following: “Rather than being a large gathering space, Olive Street Park can
5 provide a reflective, passive space for those whose families are suffering from AIDS or
6 have loved ones lost from the disease” while instructing KTUA, Kurt Carlson and
7 Timothy Henderson, to submit designs to ensure that the park could and would
8 accommodate massive numbers of people for events like World AIDS Day. [Ex. 2, Report
9 to the Park and Recreation Board (June 13, 2019).] KTU&A put on a presentation in
10 which it represented that Dr. Brad Truax Park would be a place of quiet repose for **20**
11 **people**, though Kurt Carlson’s notes indicate that he had been requested to look into
12 accommodating 300 or more people and ways to transport them via UBER and LYFT for
13 various events because of the lack of parking. [Ex. 8, KTUA, Minutes of Meeting by Tim
14 Henderson (August 30, 2017), Olive Street Park – Landscape Concept showing massive
15 Amphitheater and Amphitheater Overlook, AIDS Memorial Plaza, and Memorial Walk
16 along with a grassy area designed to host up to 2000 people.]

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18 Additionally, the finances of the planned conversion do not add up to the
19 maintenance of a small, neighborhood park. To date, the City has spent over \$3.5 Million
20 on the under 1 acre site (0.711 of an acre) This amount is \$1.5 Million more than would
21 have been needed to restore the Truax House, instead of selling it to a private developer.
22 Another \$1.5 to \$2 Million is estimated to be required to develop and rename the tiny
23 Olive Park, which has been promoted to the public as the “Woods/McKee Park” to be
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1 secretly renamed the “Dr. Brad Truax Park”. On October 12, 2017, City staff member
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3 Kevin Oliver wrote as follows about the Olive Park project:

4 *Whoa. Train wreck on the horizon. We’re going to spend public funds on a private*
5 *group’s agenda . . .? Do we have something in writing telling us to move forward*
6 *with that? Do you have a copy of what Kurt is going to show?*

7 [Ex. 9, Email Kevin Oliver (October 12, 2017)]; [Emphasis supplied.]

8 Regardless, the City has proceeded with these plans, including because Todd
9 Gloria, Mayor Faulconer and his wife, and other powerful individuals want to pursue
10 their vision of an AIDS Memorial for personal and political reasons, even if it is not
11 supported by the LGBT, Bankers Hill Community Group, the local community and
12 destroys a designated historical resource.
13

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15 In or about August of 2016, one of the heirs of the McKee family, Michal McKee
16 notified Leo Wilson at Metro Corp. that the McKee family—which had previously
17 been told that the City was converting Olive Street into the Wood-McKee Park—was
18 withdrawing their support for the AIDS memorial, now to be placed in the Brad Truax
19 Park. Ms. McKee pointed out the following:
20

21 [O]riginally, this was proposed to us as a memorial plaque to Dr. Truax **not a**
22 **full scale** AIDS memorial. The community members present at Banker’s Hill
23 have persuaded us that Woods-McKee Park is not the appropriate location for an
24 AIDS memorial. Woods-McKee Park will be a small community park. **There is**
25 **no parking available for non-residents to properly access the memorial. We**
26 **do not want to see the park be disruptive to the neighborhood’s peaceful**
27 **enjoyment. We feel a major AIDS memorial will not reflect my great**
28 **grandparents’ intent that the park serve the local community. An AIDS**
memorial should be placed in Balboa Park, or some other large venue,
where people are easily able to park and congregate. And where gatherings
won’t be disruptive. [Emphasis supplied.]

1 [Ex. 10, Email Chain between Office of Councilmember Todd Gloria, Leo Wilson,
2 Michal Bledsoe re: Woods McKee Park, August 4, 2016.]

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4 Ms. McKee was vocal in her opposition, stating that it would be the “ultimate
5 insult” to rename the Wood-McKee Park to the Brad Truax Park and that the City had
6 misrepresented the proposed “original memorial” as compared to the “wider AIDS
7 memorial” that she had read about which “belongs in Balboa Park.” (*Id.*) In response,
8 Leo Wilson at Metro Corp. told Ms. McKee that “the monument being contemplated
9 *will be small, and likely built upon the section of land that the city purchased.*” (Ex.
10 10.) This representation by Metro Corp. was false and known to be false. At the time
11 and through to the present, the plan never was for a “small” monument, but rather, for
12 the AIDS memorial to encompass more than 70% of the 0.711 combined acre parcel,
13 including an amphitheater and a massive deck listing the names of 8000 AIDS
14 victims, from where relatives could throw ashes of loved ones and other memorabilia
15 into Maple Canyon. Defendant KTUA was specifically asked to incorporate the
16 ability to accommodate hundreds of people to its design of the AIDS Memorial. The
17 secret, internal memos withheld from the public confirm these facts though
18 Defendants continue to actively mislead the public. [Ex. 8, (KTUA Memo) (August
19 30, 2017).] In response to Ms. McKee’s objections, Leo Wilson, in a follow-up
20 communication with Todd Gloria, stated, “[W]hy your office continues to pander to
21 a certain group of people puzzles me.” [Ex. 10 (Email Chain (August 4, 2016).]
22 [Emphasis supplied.]
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Maple Canyon's Environmental Sensitive and Hazardous Land

Maple Canyon, the area in which a massive deck is to be mounted, is considered environmentally sensitive land due to Maple Canyon's steep and sloping hillside that has been riddled with flooding and degradation issues. The area has continuously suffered from environmental and hazardous issues due to ongoing flooding, erosion, sediment loss and instability, plant degradation, and contamination of coastal waters. [Ex. 11, State of California Coastal Conservancy Agency, Maple Canyon Planning Meeting. (January 18, 2018).]

In fact, the Coastal Conservancy Agency and the Natural Resource Agency of the State of California have both recommended, adopted, implemented and/or funded an ongoing project to restore, secure and safeguard Maple Canyon's environmentally sensitive and biological resources. Project number 37601703001, which entails planning for and identifying projects to restore and protect Maple Canyon, remains ongoing and is currently pending CEQA evaluation. [Ex. 12, State of California Natural Resources Agency Maple Canyon Project No. 37601703001.]

The construction of the massive deck and its position, designed to jut out into Maple Canyon to provide an overlook will further severely impact the area and create serious risks of harm to the neighborhood and adjoining properties.

Maple Canyon's land and soil, including at the location where this deck is supposed to be placed, is supported by the soil type known as terrace escarpment (TEF). This type of soil, mainly present in the Mission Valley region, has severe and significant problems with erodibility and drainage. [Ex. 13, City of San Diego Planning Department Report on

1 Canyon's.] Below this sandy soil is a layer of soft gravel or sandstone. The mounting of
2 huge boulders and a heavy deck on a steep and eroding hill made up of this type of soil
3 represents an extreme level of incompetence. The fact that the CITY believes it
4 appropriate to proceed without proper analysis of the soil and the ability to support such a
5 structure, represents an extreme indifference to the health, safety and welfare of the
6 community.
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9 The instability of the soil makes this area of Maple Canyon a seismic risk zone and
10 at heightened risk of posing devastating safety hazards resulting from developmental
11 encroachments. [Ex. 13.]
12

13 The development of the Maple Canyon area will also pose a risk to the 200+
14 various species of birds, hundreds of plants, and other small mammals that are found
15 predominantly in the canyons and open space of the Uptown Region. [Ex. 14.]
16

17 Further, the development of this overlook deck atop an area that currently is open
18 space, will have a severe impact on the scientific study and further conservation of the
19 area. As identified by San Diego's City Planning Department, the area is significant:
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21 "The San Diego Formation [including Maple Canyon] is the most important
22 geological formation (Figure 58). This formation often contains both marine and
23 non-marine fossils. The fossil record, in the Uptown [Canyon] area, is extremely
24 important to not only local paleontologists, but scientists worldwide. To derive
25 maximum benefit for scientific study and conservation of paleontological resources,
26 sites must be adequately protected and the surrounding environments preserved.

27 Many of the sedimentary rocks that comprise the lithology of Uptown
28 contain fossils. The fossil record in the Uptown area is extremely important to
paleontologists. During the geologic history of the area, it went through a
succession of environments ranging from marine and lagoonal to shoreline, and
non-marine. In some cases, a geologic formation will have both marine and non-
marine fossils. This is an unusual situation and provides the paleontologist with a
unique opportunity to study a fossil assemblage from two environments."

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2 [Ex 13, pg 213.]
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4 The project also purports to preserve three of the Eucalyptus trees by wrapping the
5 deck around them. [See Ex. 3, pg 13 & 14.] The bottom half of these trees and their roots
6 will be hidden from view due to the placement of large boulders being used underneath
7 the deck to support it. It is without doubt that the city has completely failed to evaluate the
8 soil and the root system of these trees or has even seen these trees, in person or through
9 photos. Had they done so, they would have realized the significant danger posed by the
10 construction of this deck as the shallow roots of these trees along with the ongoing
11 erosion and flooding issues have slowly uprooted these trees, requiring them to be
12 constantly monitored and reinforced to ensure that they do not fall over.
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15 To date, the City has not provided any evidence that there have been any geological,
16 seismic, paleontological, biological, vegetation, flooding or soil related studies or
17 findings in connection with the placement of a Regional Park on and near Maple Canyon.
18 Nor have they evaluated the risk to human health and safety posed by the placement of
19 this Regional Park and its deck on and around Maple Canyon.
20

21 **Impact on Historically Significant Landmark**

22 The construction and development of the Regional Park, as designed, cannot be
23 completed without the destruction of significant portions of a valuable Historical
24 Landmark, the Emmet G. O'Neill House located at 2765 Second Avenue (the O'Neill
25 Historic Residence) which is impacted by this Project along its Northern (Olive Street and
26 Canyon) and Eastern (3rd Avenue) borders.
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1 The proposed and approved design for the Memorial Park includes the construction
2 of a large deck, similar in appearance to a freeway on-ramp. [Ex. 3.] Underneath the deck,
3 large boulders are stacked atop one another to support the deck from falling into the
4 canyon - the canyon that continues to suffer from massive and continuous erosion.
5 However, the design fails to accurately depict the park's proximity to the O'Neill Historic
6 Residence.
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9 The O'Neill Historic Residence was dedicated in 1991 by the Historical Resources
10 Board (HRB) pursuant to the Mills Act as the Emmet G. O'Neill Residence, Historic
11 Landmark, Site No. 311. [Ex. 14, Resolution Number 5-9109251 (September 25, 1991).]
12

13 The contemplated Regional Park and its deck are so close to the property that the
14 entire northern wall of the property, the longest and most significant portion of the
15 property, is subject to destruction and the City, pursuant to a Civil Penalty Notice and
16 Order which it served on October 30, 2018 to retaliate against Appellant because she
17 objected to the City's plan to violate its own guideline for what they can construct in a
18 Pocket/Plaza park, is currently subject to fines of \$5,500 per day, for refusing to tear
19 down portions of the original structure that the City permitted back in 1924 and is subject
20 to the Mills Act which prevents Appellant from altering the structure in any way. [Ex 15,
21 Civil Penalty Notice and Order (October 30, 2018).] The fines are being imposed unless
22 Appellant complies with the City's Notice of Violation which would require that she
23 violate the Mills Act requirement for it to remain unaltered.
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27 As it currently stands, the true location of the deck - most accurately depicted in the
28 rough drawings on page 4 of Exhibit 17 titled "Concept Development" - will allow

1 people on the deck to touch, reach and access the Historic Residence northern wall and
2 windows. Further the massive boulders supporting the deck would result in blocking the
3 air, light on the northern border and obstruct the views of the canyon. In short, what the
4 Historical Property will see is the underside of a massive deck, boulders and hundreds of
5 people milling around looking into every room of the historical property making it
6 uninhabitable and valueless which constitutes a taking by the City. Further, the current
7 plan does not appear to comply with the required set-back requirements.
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10 The O'Neill Historic Residence is a Tudor Revival home constructed in 1924. The
11 residence is one of the first custom homes built by esteemed Master Designer Ralph
12 Hurlburt and Master Craftsman Charles H. Tifal who are known for constructing
13 prestigious, custom residences and, for crafting some of the finest examples of Tudor
14 Revival homes in San Diego. The design was fully permitted by the CITY and the
15 property was constructed in conformity with the CITY's construction permit. [Ex. 16,
16 Historical Analysis of the Emmet G. O'Neill Residence.]
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19 The few Tudor Revival homes constructed by the Master duo feature commanding
20 design elements including high-pitched gabled roofs, gabled foyes, arched high ceilings,
21 large and dominate focal statement windows, classic stained glass detailing, and
22 elaborately detailed exterior brickwork and chimneys featuring unique use of brick
23 masonry and stone detailing. The O'Neill Historic Residence has and continues to be one
24 of the most exemplary constructions of Hurlburt and Tifal, displaying many of the
25 features emphasized in their construction including exquisite windows, statement bay
26 windows, high pitched, gabled roofs and ceilings, and elaborate detailed exterior chimney
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1 and brickwork.

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3 Today, 96 years later, the home continues to stand in exquisite condition having
4 been carefully maintained and restored. It remains one of a handful of prestigious
5 Historical Landmarks that are classified as completely unaltered. All of the property's
6 historically significant features, including the exterior brickwork, chimney, focal windows
7 and pitched ceilings are part of the northern portion of the home and would be completely
8 destroyed if the property complied with the City's demands to tear down portions of the
9 southern wall to allow more space for the proposed deck. [Ex. 17. Image of Northern
10 Interior of Residence showing Historically Significant features subject to Destruction &
11 Loss.] Further, the high looming deck and the boulders beneath would wholly obstruct
12 and destroy all the significant features of the property and likely subject it to complete
13 tear down as unsuitable for habitation. The proposed deck would also render the
14 Historical Property valueless as no person would acquire the property in such close
15 proximity to what will be an ongoing daily nuisance and source of destruction to the
16 Historical Property and the Canyon. The proposal for the overlook deck anticipates
17 people using the deck to throw the ashes of their loved ones into the canyon along with
18 other memorabilia. There is no way that what is being imposed on this Pocket/Plaza Park
19 will not create an ongoing nuisance and a source of ongoing litigation for the City
20 resulting from the impact on the two adjoining properties proximity to this massive
21 overlook deck.
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ARGUMENT

I. CEQA Applies To Project Number 625365.

When an action or construction is subject to CEQA, the lead agency on the project must determine whether the action is exempt from environmental review if a statutory exemption or a categorical (or regulatory) exemption contained in the CEQA Guidelines applies. (14 Cal Code Regs §15061.)

However, a categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource. (14 Cal Code Regs §15300.2(f).) In this instance, no categorical exception can apply because the Memorial Park project requires significant destruction of a valuable Historical Resource.

A. Absolute Exception for Historical Resource Applies to The Project

A “Historical Resource” includes all sites listed in, or determined to be eligible for listing in, the California Register of Historical Resources; Sites officially designated as historically significant in a local register of historical resources are presumed to be historically or culturally significant. (Pub Res C §21084.1.)

As described above, the contemplated Regional Park requires the destruction of the entire northern wall of the O’Neill Historical property, HRB No. 311. [See **Ex. 14-17.**] The destruction of the northern wall, the longest and most significant portion of the property, would cause a substantial adverse change in the significance of a historical resource as it required the demolition of a substantial portion of the property. In addition, the destruction would require the complete and total loss of the most historically significant portions of the home including the statement bay windows, high pitched,

1 gabled roofs and ceilings, and elaborate detailed exterior chimney, brickwork and bay
2 window. [See Ex. 17.]
3

4 Additionally, the overlook deck's design which calls for it to be supported by
5 massive boulders would destroy entirely the safety and security of the historical property
6 and would result in an ongoing nuisance on a daily basis resulting from the sheer number
7 of people gathering on the deck which is designed for several hundred people to be on it
8 at any particular time. There is no way to control the number, the activities, the noise, the
9 conduct, the use or for that matter, it becoming an ideal location for the homeless to live.
10 It will result in a complete defacement of the O'Neill Historical Residence due to
11 dumping and lack of proper toilet facilities.
12
13

14 Accordingly, the City must overturn its environmental determination finding the
15 Memorial Park construction categorically exempt from CEQA as all exemptions are
16 barred pursuant to 14 Cal Code Regs §15300.2, subd. (f), for causing a substantial adverse
17 change to a significance of a historical resource.
18

19 **II. CEQA's Categorical Exemption under Sections 15303¹ (New**
20 **Construction) Does Not Apply to Project Number 625365.**
21

22 The construction and development of the Regional Memorial is not exempt from
23 Section 15303 which allows for an exemption for the construction of Small Structures. In
24 relevant part, the code describes small structures as follows:
25

26 "Class 3 consists of construction and location of limited numbers of new, *small*
27 *facilities or structures*... The numbers of structures described in this section are the
28 maximum allowable on any legal parcel. Examples of this exemption include, but
are not limited to: (a) One single-family residence, or a second dwelling unit in a

¹ Unless otherwise indicated, all statutory references are to Section 14 of the California Code of Regulations.

1 residential zone. In urbanized areas, up to three single-family residences may be
2 constructed or converted under this exemption... .”

3 The contemplated new development of a Regional Memorial Park does not fit the
4 definition of a limited number of new, small facilities or structures. Again, the design
5 contemplates the complete construction of a Regional Park with a memorial area, a
6 significant overhang deck suspended in air by large boulders, fitness equipment,
7 structures and drainage to accommodate flood paths, and numerous other amenities
8 capable and intended to accommodate hundreds of people. [See Ex. 3 & 8.]
9

10 The fact that this park differs in scope and size from general plan guidelines further
11 indicates this as anything but a limited construction of small facilities. Finally, the project
12 will require significant engineering to adapt a deck onto an eroding canyon without
13 further collapsing the surrounding area, increasing erosion, and intensifying flooding
14 issues.
15

16
17 **III. CEQA’s Categorical Exemption under Sections 15332 (In-Fill**
18 **Construction) Does Not Apply to Project Number 625365.**
19

20 The construction and development of the Regional Memorial does not qualify for
21 exemption from CEQA as an In-Fill Construction. To qualify for an In-Fill Project
22 exemption, Section 15332 requires, in relevant part, satisfaction of the following
23 conditions:
24

25 “(a) The project *is consistent* with the applicable general plan designation and all
26 applicable *general plan policies* as well as with applicable zoning designation and
27 regulations. ...

28 (c) The project site has no value as habitat for endangered, rare or threatened
species.

(d) Approval of the project would ***not result in any significant effects relating to traffic, noise, air quality, or water quality.***

1 (e) The site can be adequately served by all required utilities and public services.”
2

3 The CITY reached this determination without making any reference as to how it
4 identified, verified and confirmed that this project satisfies any of the above conditions.
5 However, the exemption described above does not apply because the project is not
6 consistent with general plan policies, the project site has value for rare species, the plan
7 would result in significant impact to traffic, noise, and water quality and the site is not
8 adequately served by all required utilities and public services.
9

10 As indicated above, the proposed Memorial Park does not comply with General
11 Plan regulations. The Project is designed to be an “AIDS *Regional* Memorial Park” which
12 was originally located two blocks away in Balboa Park to accommodate the large groups
13 anticipated. The Project, as proposed in Maple Canyon, is intended to encompass .367
14 (16,000 sq ft.) over Olive Street and another .344 parcel (15,000 sq ft.). Together the total
15 area encompasses .711 of an acre. The proposed Regional Park, per the City General Plan
16 for Park Guidelines (“Guidelines”), would require a minimum of 13 acres. Per the
17 Guidelines, a park which is under 1 acre is a “pocket park or plaza” and is designed to
18 serve the neighborhood within a ¼ mile radius. Accordingly, the location of a Regional
19 park intended to accommodate significant visitors and traffic does not conform to the
20 General Plan’s mandate that limit what can be constructed on a site that is under an acre
21 and designated a Pocket Park/Plaza.
22

23 The enlarged scope of this project, beyond that permitted by the Guidelines, further
24 indicates the significant impact of the project on the neighborhood's traffic and noise. The
25 accommodation of hundreds of people into a park located within a small, quiet, residential
26
27
28

1 cul-de-sac, will significantly and adversely impact the neighborhood and surrounding
2 area. While the Park plans declare there is a handful of parking spaces available for the
3 park, this fact is contradicted by the fact that all parking spaces are occupied by the
4 nearby homes and the large condominium complexes directly across the street with
5 another complex under construction at this very moment. [See **Ex. 8, pg 4.**] Further to the
6 above, as previously described, the issues relating to Maple Canyon's severe erosion and
7 water runoff signify that the deck and its placement are likely to have serious ongoing
8 adverse effects on water quality resulting from severe storm runoff.
9

10
11 The scope and amount of people that this park is intended to accomodate in such a
12 small area, is also indicative of the fact that the services and the required utilities and
13 facilities will not be met by this tiny park.
14

15 Lastly, as indicated by the City's Planning department, the Uptown area canyons,
16 including Maple Canyon, is habitat for diverse vegetation and wildlife including reptiles,
17 small mammals and over 200 species of birds. [**Ex. 13.**] The placement of this project will
18 disturb these habitats.
19

20 Accordingly, the Regional Memorial Park project does not qualify for exemption
21 from CEQA as an In-Fill Construction and compliance with CEQA is required.
22

23 **IV. Even if Categorically Exempt, An Exception To the Exemption Applies**
24 **to Project Number 625365.**
25

26 Categorical exemptions are not absolute. Although a project might be categorically
27 exempt, an exemption must be denied if an exception applies. (See, 14 Cal Code Regs
28 §15300.2(c); *World Business Academy v State Lands Comm'n* (2018) 24 CA5th 476, 491;

1 *Save Our Schools v Barstow Unified Sch. Dist. Bd. of Educ.* (2015) 240 CA4th 128, 140.)

2
3 a. Unusual Circumstance Exception

4 If there is a "reasonable possibility" that an activity will have a significant effect on
5 the environment due to "unusual circumstances," an agency may not find the activity to be
6 categorically exempt from CEQA. (14 Cal Code Regs §15300.2(c).) This exception
7 applies when there is 1) an unusual circumstance, and 2) a significant impact as a result of
8 those unusual circumstances. (*Berkeley Hillside Preservation v City of Berkeley* (2015) 60
9 C4th 1086, 1104; *San Diegans for Open Gov't v City of San Diego* (2019) 31 CA5th 349,
10 373; *McCorkle Eastside Neighborhood Group v City of St. Helena* (2018) 31 CA5th 80,
11 95; *Aptos Residents Ass'n v County of Santa Cruz* (2018) 20 CA5th 1039, 1054.)

12
13
14 As described above and incorporated herein, many of the previously identified
15 issues and facts relating to the development and construction of the Regional Memorial
16 Park constitute "unusual circumstances" including, among other things, the sensitive
17 nature of Maple Canyon, the likely damage and destruction to the Canyon due to the deck
18 and ongoing dumping that will result, the need to destroy a historical resources to
19 accommodate the park, the significant deviation from general plan guidelines, the
20 unusually close proximity of the deck to residential and commercial property, and the
21 ongoing nuisance as well as safety and health issues that this park will impose on the
22 community and the surrounding area.

23
24
25 As further described above and incorporated herein, these unusual circumstances
26 will result in significant impacts on, among other things, biologically sensitive areas,
27 historically significant areas and the health and safety of members of the community.
28

1 Thus, the Regional Memorial Park project, even if exempt, must comply with
2 CEQA pursuant to the unusual circumstances exception.
3

4 b. Sensitive Environment Exception Applies

5 Several classes of projects designated as categorically exempt, including those
6 exempt under Section 15303, are qualified by the requirement that the location of the
7 project be considered in determining whether a categorical exemption applies (14 Cal
8 Code Regs §15300.2(a).) A project that is ordinarily insignificant in its impact on the
9 environment may have a significant impact if located in a particularly *sensitive*
10 *environment*. Thus, an exemption will not apply to an activity occurring in a uniquely
11 sensitive environment, such that, the activity may have an impact on an "environmental
12 resource" of "hazardous or critical concern." (14 Cal Code Regs §15300.2(a); See also,
13 *Don't Cell Our Parks v City of San Diego* (2018) 21 CA5th 338, 363.)
14
15
16

17 The Memorial Park includes a deck that will be mounted onto and hang over Maple
18 Canyon, suspended in the air by the placement of large boulders. The area in which the
19 massive deck is to be mounted is environmentally and biologically sensitive lands based
20 on Maple Canyon's unstable soil, geological issues, drainage issues, ongoing flooding and
21 the steep and sloping hillside, among other things. Additionally, the area suffers from
22 ongoing environmental issues including appalling erosion, ever-increasing sediment loss,
23 soil instability, degraded ecosystems, significant loss to native vegetation, extreme
24 flooding as identified in FEMA's National flood hazard layer, elevated pollutants, and
25 contributes to increased contamination of waters within the coastal zone. [See **Ex. 4,**
26 **11-13, 17.**]
27
28

1 In fact, in a 2018 Maple Canyon Planning meeting, the State of California Coastal
2 Conservancy Agency recommended certain environmental evaluations be undertaken
3 including “geotechnical investigations, hydrologic analysis of existing conditions and
4 peak flow rates for Maple Canyon, endangered species surveys of the site... ” be
5 undertaken to identify and prepare plans to address these environmentally significant and
6 hazardous issues. [Ex. 11, State of California Coastal Conservancy Agency, Maple
7 Canyon Planning Meeting. (January 18, 2018.).] In addition, the City’s own Planning
8 Department has also identified Uptown areas, including Maple Canyon as
9 environmentally and biologically sensitive areas. [Ex. 13.]
10
11
12

13 Thus, the Regional Memorial Park project, even if exempt, must comply with
14 CEQA pursuant to the sensitive environment exception.
15

16 c. Violation of San Diego Municipal Code § 128.0208.

17 San Diego Municipal Code § 128.0208 allows the Planning Director to avoid the
18 preparation of an Environmental Initial Study or the Environmental Impact Report if it is
19 determined that the project is exempt from CEQA per § 15061. The City is in violation of
20 San Diego Municipal Code § 128.0208 because it has not conducted either study and does
21 not qualify for exemption per Section 15061 because, as described above, exceptions are
22 applicable to this project.
23

24 d. Violation of San Diego Municipal Code §142.0230

25 San Diego Municipal Code §142.0230 mandates that all development within a
26 Special Flood Hazard Area shall comply with Chapter 14, Article 3, Division 1
27 (Environmentally Sensitive Lands Regulations). The Maple Canyon area is subject to
28

1 extreme flooding and has been identified by FEMA as a flood Zone A, per FEMA's
2 National flood hazard layer. [See Ex. 11.] Accordingly, further study per CEQA is
3 required.
4

5 **V. The Notice of Appeal and CEQA Determination are both Improper, Unlawful**
6 **and Void.**
7

8 A. Unreasonable and Improper Fee Required to Exercise Right to Appeal

9 The \$1,000 fee submitted by the applicant and required for this appeal, is being
10 submitted under protest. The San Diego Municipal Code does not authorize the
11 imposition of this fee for appeal.
12

13 Further, the \$1,000 fee is also unreasonable and works to effectively strip a
14 significant segment of San Diego citizens from exercising their rights to 1) safeguard and
15 protect their general welfare and that of other citizens and 2) to protect their right to the
16 enjoyment of the natural resources of the state, rights which are specifically identified in
17 support of CEQA. (Public Resources Code § 21000.) To the extent that this policy
18 significantly limits CEQA appeals and allows the City to shirk its duty for environmental
19 protections, it is invalid as contradictory to the mandate requiring agencies to develop the
20 procedures *necessary to protect environmental qualities*. (Public Resources Code §
21 21001.)
22

23 B. The Issuance of the NORA is Void Per COVID-19 Orders
24

25 As of March 19, 2020, all private individuals and non-essential businesses and
26 agencies have been ordered to stay at home per the Statewide mandatory imposition of the
27 "Safer-at-Home" directive.
28

1 The NORA for Project Number 625365 was first issued on April 8, 2020 and then
2
3 pulled for further review. Sometime after April 9, 2020, the City updated its NORA
4 website to state the following:

5 COVID-19 Update: Per San Diego City Charter Article 15, Section 295, the City
6 Council has suspended the application of CEQA for all Qualifying Projects. ...
7 consistent with California Governor Gavin Newsom's Executive Order N-32-20.
8 Also, in accordance (sic) Mayor Kevin L. Faulconer's Executive Order 2020-2, to
9 limit unnecessary public exposure, follow social distancing requirements, protect
10 public health, prevent the spread of COVID-19 and ensure the continuity of City
operations, hard copies of NORA environmental determinations will not be posted
at the downtown Development Services Center until further notice.

11 By the above notice, it is clear that the City's agency issuing NORA is aware of the
12 significant health risk, limitations on the availability of NORA related information,
13 extreme limitations on movement, and complete lack of public access to government and
14 private organizations created by COVID 19. Nevertheless, **on April 13, 2020**, the City
15 issued a new NORA for this project knowing that the public and appellant's ability to
16 properly appeal this determination would be crippled and result in significant prejudice to
17 the exercise of their rights to appeal for which the deadline imposed is April 27, 2020.
18 Appellant has, in fact, been wholly prejudiced by the City's attempt to move this appeal
19 forward at a time when appellant and the public have almost no ability to mount a proper
20 appeal due to an inability to obtain and review public records, the lack of access to CEQA
21 research on her rights to appeal, inability to contact public agencies which handle relevant
22 environmental, conservation and hazardous related issues. Appellant views the City's
23 election to issue a new Nora during the stay, as a further indication/representation of the
24 extent to which this City is prepared to go to retaliate against her for objecting to the
25
26
27
28

1 City's violation of its own guidelines by attempting to construct a Regional Park in a
2 Pocket Park/Plaza in violation of its own constitution.
3

4 Further, the City's continued and ongoing issuance of NORA notices defies their
5 own COVID-19 statement, Governor Gavin Newsom's Executive Order N-32-20, and
6 Mayor Faulconer's Executive Order 2020-2 limiting functions to only essential services
7 and specifically requiring agencies to only undertake "appropriate levels of essential
8 services." Surely, the issuance of NORA notices is not an essential activity in light of the
9 right to petition the Courts and the preservation of constitutional rights for in-custody
10 individuals falls being categorized as non-essential services and temporarily eliminated.
11

12 Additionally, the requirement for filing the appeal within 10 business days is
13 ineffective as, since the issuance of the above orders, government agencies have
14 consistently deemed each day to operate as a Sunday for notice/filing purposes.
15

16 Accordingly, Petitioner preserves her right to amend, alter and supplement this
17 appeal due to the extreme limitations posed by COVID-19 restrictions and the City's
18 inattentiveness to this matter in issuing a 10 day NORA demand.
19

20 CONCLUSION

21 The City maintains that "[a]ll development (small and large) in San Diego is subject
22 to a wide variety of land use and environmental regulations pursuant to local, state, and
23 federal law including but not limited to the following: California Environmental Quality
24 Act . . ." However, in connection with the instant Project, the City wants to push the
25 project forward without considering the instant property's physical or environmental
26 characteristics, the impact of the project's design and/or physical characteristics and
27
28

1 impact due to its density, intensity, height, size and/or the fact that the use could generate
2 significant impacts (i.e., traffic, grading, noise, environmentally sensitive resources,
3 coastal resources, public view blockage, community character, public facility impacts);
4 and/or the vehement community and/or neighborhood opposition to locating a Regional
5 Park in what is under an acre site in violation of this City's constitution/guidelines.
6
7

8 Although the project contemplates significant development and construction in
9 undeveloped areas, poses significant risk to biological and environmental systems and
10 poses significant danger to surrounding neighbors, the City has not conducted any
11 environmental or any studies or investigation related to this development. That the City
12 has turned a blind-eye or is unaware of these significant issues does not support the
13 conclusion that the project is exempt from CEQA. Rather, the exact purpose of CEQA is
14 to provide the City and the community with notice of the impacts of such significant
15 developments before they are undertaken and before such risks and harm are imposed on
16 the community.
17
18

19 It is respectfully submitted that the City must overturn its environmental
20 determination finding the Memorial Park construction categorically exempt from CEQA
21 as all exemptions are barred pursuant to 14 Cal Code Regs §15300.2, subd. (f), for
22 causing a substantial adverse change to a significance of a historical resource and for a
23 finding that the environmental determination that this Project is exempt be denied in its
24 entirety.
25
26

27 Dated: April 27, 2020

LAW OFFICES OF JENNIFER J. HASSO

By


Jennifer J. Hasso, Appellant